
Online Therapy: Do the Benefits Outweigh the Potential Legal Ramifications?

Penny Damaskos, LCSW, OSW-C
Yeshiva University*

Scope of the Problem: Prevalence of Online Therapy and the (lack of) Regulatory Response

The delivery of psychosocial support through the internet is an area of clinical practice that is becoming increasingly prevalent as clinicians search for innovative ways to reach clients in need of psychosocial support (Banach, 2000; Patrick, 2008; Pollack, 2008). There are many benefits to providing psychotherapeutic services online. Internet-based support groups can reduce isolation and increase access to care for individuals that may have physical limitations or live in remote geographic locations. In some instances, online groups can provide individuals with anonymity as they seek out clinical services for stigmatized conditions such as a cancer diagnosis (Banach; Patrick; Pollack). In addition, online therapy can be an inexpensive way to provide service (both for the provider and client), rendering it an increasingly viable option in an era of increasing financial distress (Banach; Patrick; Pollack).

The development and availability of internet-based services has outpaced the legal and regulatory responses to these services. This lag in response is troubling as there are multiple vulnerabilities associated with internet-based counseling services. These online therapeutic interventions have the potential to result in legal action, with complex issues around licensing compliance and assurance of clinical competencies, client privacy, and clarity around termination of services. Ethical principles fundamental to social work practice, such as a clinician's obligation to respect patient privacy and commitment to "do no harm," may also be challenged. Internet-based therapy may also pose challenges to the provision of quality clinical services.

This paper will define the types of internet services available and the scope of clinical practice. In addition, this paper will identify potential pitfalls, from a legal perspective, by referring to two cases: 1) *Tarasoff v. The Regents of the University of California* (1976) for historical precedence to examine the extent to which an online therapist must adhere to "duty to warn" and confidentiality and 2) *Grondhal v Bulluck* (1982), which provided legal parameters and definition to the "beginning" and "end" of a therapeutic relationship.

With both of these legal cases, the issue of internet counseling is not directly addressed due to historical timing of the decisions. However, they can provide the precedence on which future cases involving internet counseling might be considered. Each case illustrates a ruling that could influence some aspect of internet counseling services as they examine rules on privacy, "duty to warn," and provide definition to the establishment of a therapeutic relationship. This paper will address whether the potential pitfalls of online therapy pose an erosive aspect to the fundamentals of the therapeutic process or can be seen as a boon to clinical practice (Patrick, 2008). Understanding and assessing non-verbal cues, a longstanding staple of therapeutic training, may be lost in all online therapeutic interactions (Banach, 2000). Online therapy practices could lead to a redefinition of counseling at the very least, or a complete reconfiguration of the therapeutic process at the very most (Patrick).

What is Online Therapy?

Consistent terminology for online therapy has not yet been established nor agreed on by the online therapy community. Some terms used to describe internet counseling are: cyber therapy, e-counseling, email counseling, e-therapy, web counseling, e-psychotherapy, internet psychotherapy or online therapy/psychotherapy (Banach, 2000; Patrick, 2008). However, it is not clear if any or all of these terms refer to the same product, approach or modality (Banach; Patrick;). These multiple labels contribute the potential blurring of services provided on the internet. The lack of clarity, with respect to what these services are and offer, is confusing for therapists and clients alike. This confusion contributes to perception of inconsistent quality and standards for online therapy. In this paper, all online and internet therapy and counseling will be referred to as “online therapy.”

Online therapy has also been defined as short-term and time-limited (Banach, 2000). It tends to be less expensive than face-to-face therapy and does have reimbursement codes associated with it for billing purposes (Banach; Pollack 2008). There are limitations for utilizing an online therapeutic approach however, such as when treating patients with acute psychiatric illness or with substance abuse counseling (Banach).

Some professional organizations such as the National Board for Certified Counselors have responded to the potential ambiguities inherent in online therapy by developing standards of care, while other organizations have simply developed care recommendations with no mechanisms in place for their enforcement (Banach, 2000; Patrick, 2008; Zack, 2008). In addition, there is no regulatory oversight for the provision of online therapy as anyone can pose as a “therapist” and an “expert” in cyber space. This lack of supervision and regulation increases the possibility of fraudulent service delivery and the potential erosion of trust by consumers for online therapy services (Banach; Patrick; Zack).

Online Therapy: Who does it benefit?

Online therapy can have distinct advantages for all individuals who seek out counseling. There are numerous reasons to pursue online therapy including: convenience, efficiency, cost, reduction in isolation and the development of a widened and expanded community of social support. Individuals can avail themselves of individual counseling through the internet and online therapy or through online support groups. Online interactions can also provide a certain level of anonymity, which can give individuals who may be otherwise inhibited, a comfortable forum for discussion (Patrick, 2008; Banach, 2000; Pollack, 2008). Online therapy can positively impact multiple populations in need and is often used by individuals with medical conditions such as cancer. For these populations, online therapy and online support groups can serve to reduce isolation and provide up-to-date information to great therapeutic benefit.

What are the legal questions raised by Online Therapy?

At the time of this review of literature, there have been no cases that specifically address the legal parameters of online therapy (Zack, 2008). However, the apparent lack of legal cases around this issue most likely reflects a delayed response by the legal system, rather than a paucity of legal complications inherent in online therapeutic interactions. It is important to note that, even though the terms for online therapy vary and are not called online therapy alone, they are all still subject to the laws that have been established around traditional counseling (Zack, 2008). In fact, online therapy is considered therapeutic counseling, with no differences from the traditional face-to-face counseling practiced in in-person clinical settings (Zack). This is

significant from a legal standpoint as the laws that have regulated online therapy practices in the past may not be applicable to the current trend of online therapy (Zack). The relevance of the application of precedent law to the realm of online therapy may depend on the specific clinical services that the therapist/counselor is delivering; therefore it is essential that consensus is established about the definition of therapy when it is delivered through the internet (Zack). Some states, such as Arizona, have already established firm definitions of online therapy through statutes that include the delivery of behavioral health services by electronic means with behavioral counseling defined specifically as social work, substance abuse, and marriage counseling among other services (Zack).

Online Therapy and Revisiting: Duty to Warn vs. Confidentiality

As with traditional counseling, the ethical issue of “duty to warn” at the expense of patient confidentiality is of major concern in online therapy. Health care professionals have an obligation to break the patient confidentiality rule if they feel their client is at risk for harming themselves or others. The therapist can be held accountable for any subsequent violent actions made by their clients (Banach, 2000; Zack, 2008). This obligation is based on the landmark case *Tarasoff v. The Regents of the University of California* (1976), which went before the Supreme Court of the State of California both in 1974 and 1976. Briefly, this case concerns a therapist failed to warn a client’s girlfriend that the client planned to hurt her. The girlfriend was subsequently stabbed to death by the client. The Supreme Court of California ruled that the therapist was obligated to break the confidentiality rule and warn the woman of potential harm.

Online and internet services present difficulties with respect to a therapist’s “duty to warn.” Even though most states have adopted *Tarasoff*, the extent to which a therapist is obligated to warn, changes on a state-by-state basis (Banach, 2000). For online therapy, the duty to warn is complicated by the fact that state localities are not all governed by consistent laws. These legal inconsistencies, coupled with the potential that the therapist may not know the location of an online client at the time of a homicidal ideation, can present very real obstacles to fulfilling the “duty to warn” (Banach). In addition, the internet has built-in risks for confidentiality that could lead to liability for the counselor and vulnerabilities for the client (Banach; Pollack, 2008).

Other Issues of Confidentiality

A counselor could unwittingly break the confidentiality of online clients by not encrypting their therapeutic transmissions, thereby leaving them vulnerable to third party interceptions (Banach, 2000). It is not uncommon for emailed information and communication to get lost in transmission or fall into the email box of an unintended recipient such as an employer, which in some cases could have harmful consequences to a client (Banach; Zack, 2008). In addition, therapists have to be mindful about storage of confidential clinical interactions that could potentially be hacked or misused by unauthorized persons leaving them vulnerable to malpractice and breach of patient privacy (Banach). If an online counselor breaks the law by revealing confidential information of the client, or is found to be providing services without proper licensing, he/she could be subject to penalties under state law. However, penalties for these situations are not consistent and may vary throughout the United States (Zack).

When does the online therapeutic relationship begin and end?

Another issue of concern with online therapy is the extent to which an online therapist is responsible to a client. Within the cyber environment, the “beginning” and the “end” of a therapeutic relationship can be unclear and ill-defined (Banach, 2000). In face-to-face therapy, the relationship between the therapist and a client is marked by the first visit and usually includes a verbal or written contract between the two parties. In online therapy however, the obligation on the part of the therapist is based on an email or online transmission, which creates a less distinct marker to the commencement of services (Banach). This ambiguity raises questions about when billing begins as well as the definitive commencement of online therapy.

The courts have addressed several cases that delineate the beginning of a therapeutic relationship (Banach, 2000). These malpractice suits examine telephone-based therapeutic services and can serve as a precedent for online interactions (Banach). In the case *Grondhal v Bulluck* (1982), the court found that telephone calls that resulted in the delivery of medical (therapeutic) advice could constitute a “professional service” between a client and a health care provider. The court also found that telephone conversations between a physician and a patient was sufficient evidence of an established relationship even after the in-clinic care had been terminated (Banach). This case has relevance to online therapy because it addresses the ambiguities that are present in cyber-based interactions that, without clarification, could leave clinicians legally vulnerable and clients deeply distressed. This case also addresses the misunderstandings that can take place with respect to the parameters of an in-person, therapeutic relationship which can be exacerbated in an online context where facial expressions are absent from the dialogue. In addition, email transmissions can get lost in cyberspace creating an overlay of potential misunderstandings to the therapeutic relationship.

Conclusion

Online therapy has the potential for great benefit for the client seeking counseling services however, it also has the potential for confounding communication between therapists and clients. The legal ramifications concerning patient confidentiality or clinical malpractice have long been established in traditional, in-person therapeutic settings. The online therapist can provide a safe, confidential and clinically solid therapeutic setting by establishing a few simple protections for themselves and their clients. Risks can be mitigated by well-stated disclaimers and online contracts/agreements prominently placed on web sites. These contracts should be acknowledged and signed at the onset of any therapeutic interchange (Banach, 2000).

Online therapists should invest in encrypted email/online services when communicating with clients so that all information is protected from third party interception (Banach; Zack, 2008). Computers, with built in video features or internet communication services such as “Skype,” can provide additional resources to combine “face-to-face” with remote therapeutic sessions.

The potential benefit and clinical integrity of online therapy can be protected by simple precautions and clear communication initiated by the online therapist. These precautions should minimize the potential for unfortunate legal consequences resulting in restrictions on an expanding modality with much therapeutic benefit.

References

- Abbott, J. M., Klein, B., & Ciechomski, L. (2008). Best practices in online therapy. *Journal of Technology in Human Services*, 26(2/3), 360-75.
- Banach, M., & Bernant, F. P. (2000). Liability and the internet: risks and recommendations for social work practice. *Journal of Technology in Human Services*, 17, (2/3), 153-171.
- Grondahl v Bulluck*, 318 N.W. 2d 240 (1982).
- Patrick, P. K. S. (2006). Providing counseling online: because we “can”, should we? Retrieved from <http://www.counselingoutfitters.com/Patrick2.htm>
- Pollack, D. (2008). Social work comes to the small screen: Legal challenges of tele-social work. *Journal of International Social Work*, 51(6), 841-6.
- Recupero, P. R. (2005). E-mail and the psychiatrist-patient relationship. *Journal of American Academy Psychiatry Law*, 33(4), 465-75.
- Tarasoff v. The Regents of the University of California* 551 P.2d 334 (1976).
- Zack, J. S. (2008). How sturdy is that digital couch? Legal considerations for mental health professionals who deliver clinical service via the internet. *Journal of Technology in Human Services*, 26(2/3), 333-59.
- *2009-10 recipient of the American Cancer Society’s Doctoral Level Oncology Social Work Training Grant # DSW-09-219-01-SW.